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Defendant.

ORDER

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¹ Refers to the court's docket number.

1 **II. Discussion**

2 Pursuant to 28 U.S.C. § 2255, a prisoner may move the court to vacate, set aside, or correct
3 a sentence if “the sentence was imposed in violation of the Constitution or laws of the United
4 States, or that the court was without jurisdiction to impose such sentence, or that the sentence was
5 in excess of the maximum authorized by law, or is otherwise subject to collateral attack.”

6 28 U.S.C. § 2255; 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and*
7 *Procedure* § 41.3b (5th ed. 2005).

8 In his motion for relief under § 2255, Monjaraz argues that his counsel was constitutionally
9 ineffective because his counsel failed to file a notice of appeal after he requested an appeal be filed
10 and failed to raise an *Apprendi* challenge relating to the amount of methamphetamine which
11 resulted in a higher base sentencing guideline range. *See* Doc. #22.

12 The Sixth Amendment to the Constitution provides that criminal defendants “shall enjoy
13 the right to have the assistance of counsel for his defense.” U.S. Const. Amend. VI. To establish
14 ineffective assistance of counsel, a petitioner must show that his counsel’s performance was
15 deficient, and that petitioner was prejudiced as a result of counsel’s deficient performance.
16 *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In determining whether counsel’s performance
17 was deficient, the court must examine counsel’s overall performance, both before and at trial, and
18 must be highly deferential to the attorney’s judgments.” *Quintero-Barraza*, 78 F.3d at 1348 (citing
19 *Strickland*, 466 U.S. at 688-89) (internal quotations omitted). Once a petitioner has established that
20 counsel’s performance was deficient, the petitioner “must then establish that there is a reasonable
21 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have
22 been different. A reasonable probability is a probability sufficient to undermine confidence in the
23 outcome.” *Id.*

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1 IT IS THEREFORE ORDERED that defendant's motion to vacate or correct sentence
2 pursuant to 28 U.S.C. § 2255 (Doc. #22) is GRANTED in-part and DENIED in-part in accordance
3 with this order.

4 IT IS FURTHER ORDERED that the clerk of court shall VACATE and RE-ENTER the
5 judgment in this action (Doc. #20).

6 IT IS SO ORDERED.

7 DATED this 18th day of October, 2011.



9
10 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE